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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re E.M. et al., Persons Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

INES M. et al.,

Defendants and Appellants.

D060658

(Super. Ct. No. NJ14152A & B)

APPEAL from orders of the Superior Court of San Diego County, Blaine K.

Bowman, Judge. Affirmed.

Ines M. and Israel M. (together, the parents) appeal juvenile court orders, made at an 18-month permanency review hearing, continuing their minor children, E.M. and I.M. (together, the minors) as dependents in out-of-home care with permanent plans of Another Planned Permanent Living Arrangement (APPLA). The parents contend that

there was no substantial evidence to support the court's finding that returning the minors to either parent's custody would be detrimental to the minors' safety, protection, or physical or emotional well-being. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

The parents have five children: E.M., I.M., J.M., A.M. and D.M. (collectively, the children). In May 2009, nine-year-old E.M. and seven-year-old I.M. became dependents of the juvenile court under Welfare and Institutions Code¹ section 300, subdivisions (a) and (j) and were removed from parental custody based on findings that Ines physically abused I.M. and the other children, and subjected J.M. to acts of cruelty.² Although Israel had been living with the family at the time the minors were detained, his whereabouts were currently unknown. The court placed the minors in foster care and ordered Ines to participate in reunification services.

According to a six-month review report, Ines said that Israel, who was undocumented, had a history of domestic violence and alcohol abuse. He fled to Mexico when the children were detained because he feared being arrested and sent to prison. Ines admitted having sporadic contact with him, but she could not provide his contact information.

¹ Statutory references are to the Welfare and Institutions Code.

² Petitions were also filed on behalf of five-year-old J.M., three-year-old A.M. and one-year-old D.M., but they are not subjects of this appeal.

The minors had been placed together in the same foster home, together with J.M. and A.M. I.M. was exhibiting sexualized behaviors toward J.M., was physically aggressive with E.M. and A.M., and had behavior problems at school.

Ines was participating in services and making slow progress. She was having supervised visits with all five children twice a month. Despite having completed parenting classes, Ines struggled with properly parenting the children and was in denial about the possibility that they had been sexually abused or exposed to sexual behavior. At the six-month review hearing, the court continued the minors as dependents in out-of-home care and ordered six more months of services for Ines.

Ines continued to make progress with her case plan during the next six months. She was having four hours of unsupervised visits with all five children once a week. However, she was easily overwhelmed by the children's active behaviors and had difficulty disciplining them consistently. I.M.'s aggressive behaviors had decreased, but he continued to target J.M.. At the 12-month hearing, the court continued the minors as dependents in out-of-home care and ordered services for Ines to the 18-month date.

Several weeks later, Ines was authorized to have overnight and weekend visits with the children, conditioned on I.M. and J.M. having separate visits. However, overnight visits never occurred because Agency learned that Ines had allowed the children to visit Israel without Agency's knowledge or approval. Ines had recently been deported to Mexico and was living in Tijuana.

In October 2010, Israel contacted the social worker and informed her that he had returned to the United States and wanted visitation with the children. The social worker

was concerned about the risks that Israel posed to the children because he had been out of their lives for 17 months; he had made no attempt to contact Agency, schedule visits with the children or learn how to obtain custody of them; he reportedly abused alcohol; and he admitted having been involved in a domestic violence incident with Ines in the presence of the children. Despite its concerns, Agency authorized weekly supervised visits between Israel and the children. During those visits, Israel did not interact much with the children or assume a parental role.

Israel made his first appearance in the dependency case at the 18-month permanency review hearing, and the court appointed counsel for him. The parents reported that they had reconciled and that Israel intended to move to Tijuana to be with the family. All of the children, except E.M., wanted to live with Ines. E.M. understood that if he moved to Mexico, he might not be able to return to the United States due to his undocumented status. In January 2011, the Mexican social service agency, Desarrollo Integral de La Familia (DIF), conducted an evaluation of Ines's home in Tijuana and declined to approve the home for placement of the children because it was found to be inadequate and unsafe. The evaluator noted that Ines's breath smelled of alcohol, and that although Ines denied drinking, there were beer bottle caps in a trash can inside the apartment. Additionally, Ines failed to provide requested information about a school for the children and a local clinic.

Agency learned that Israel had physically abused E.M., I.M. and J.M. when the children were living with the parents. The minors provided consistent details about how Israel hit them with a belt, an exercise grip and a hanger, and reported that they saw him

drinking and throwing things in the house. The minors also reported that they had been exposed to adult movies in the family home. Both parents denied that Israel had physically abused the children and also denied that the children had been exposed to pornography. Although Israel had completed a parenting class and said that he wanted the children placed with him, Agency still believed that the children would be at risk in his care. Israel stated that he did not have time to participate in treatment for alcohol abuse or domestic violence because he had to work to support himself and to help support Ines in Tijuana.

When I.M. continued to engage in sexualized behaviors, his foster mother requested that he be removed from her home. Agency filed a supplemental petition under section 387 on behalf of I.M., alleging that he required specialized care and treatment because of his aggressive and sexualized behaviors toward his siblings and peers.³ The court detained I.M. at the San Diego Center for Children and he began participating in a treatment program to address his negative behaviors. He was making homicidal and suicidal threats, and was taking medication for depression, anger, inattention and poor concentration.

Agency was now recommending that the court terminate reunification services for Ines and place J.M., A.M. and D.M. with her in Tijuana. DIF had approved Ines's home and offered to provide monthly home visits. The children's overnight weekend visits

³ When I.M.'s behavior later improved, the court granted Agency's request to dismiss the section 387 petition because I.M. no longer needed a higher level of care.

with Ines were going well, and Ines had contact information for a court-approved therapist.

Agency also recommended placing the minors with Israel, who had been visiting the children every week. Israel, who was still living in the United States, had completed parenting classes, said that he was attending Alcoholics Anonymous (AA) meetings and agreed to participate in conjoint therapy with I.M. Israel said that he was aware of I.M.'s sexualized behaviors and was willing to provide more supervision for him. The minors did not want to live in Tijuana. Although I.M. wanted to live with Israel, Agency still had concerns about this placement, including Israel's ability to supervise the children while they were in his care, and his lack of follow through with services. In addition, Israel cancelled visits because of his work schedule, and the minors said that they rarely saw Israel on the weekends because he was always working. Agency was also concerned about Israel's ability to stay involved with I.M.'s treatment program, which was crucial to reducing I.M.'s risk of engaging in sexually inappropriate behavior "with other children, family members and in the community."

In July 2011, Israel told the social worker that he was not ready to have the minors placed with him because he had a new job and would not have time to care for them. A few days later, Israel failed to pick up the minors for a weekend visit, and did not inform them that the visit would not occur. As a result, the minors were disappointed, sad and confused. The next week, Israel changed his mind about having custody of the minors and told the social worker that he had made arrangements to move with them to his aunt's home.

According to an addendum report, Agency was no longer recommending that the court place the minors with Israel. Israel admitted that he had recently engaged in a domestic violence incident with a female roommate who babysat for the minors. He said that the woman became physically aggressive with him while he was driving because he had refused to remain in a relationship with her. Israel stopped the car and grabbed the woman by the hands and arms in an attempt to have her get out of the car. This resulted in bruising to her arms. She followed through on her threat to call the police.⁴ Consequently, Israel was "in hiding" and did not attend the next court hearing because he was afraid that he would be arrested. Further, Israel did not have a stable home and was earning less money than he had previously earned. He told the social worker that he did not know what to do about the minors.

Agency did not believe that it would be in E.M.'s best interests to place him with Ines in Tijuana because doing so would add financial strain to Ines. Additionally, if E.M. was returned to Ines, his undocumented status would prevent him from returning to the United States to live with Israel in the event that Israel's situation stabilized in the future. As to I.M., Agency determined that he no longer required placement in a group home but instead, that he should be placed in foster care and attend the outpatient treatment program. Because of I.M.'s need for ongoing treatment of his sexually reactive behaviors, Agency believed that it would be detrimental to I.M. to be returned to Ines's

⁴ The detective assigned to the case told the social worker that the woman had bruises on her arms and a bruise on her thigh from the incident. She reported that she was pregnant with Israel's child, but he denied that he was the father. At the time the social worker prepared the addendum report, the incident was still under investigation.

custody where the younger siblings lived. Agency recommended that the court terminate reunification services for Ines and order APPLA in a licensed foster home as the minors' permanent plans. Once Israel's situation stabilized, Agency would reevaluate the minors' placement with him.

Just before the contested 18-month permanency review hearing, J.M., A.M. and D.M. told the social worker that they were living in a small house in Tijuana with Ines and two "uncles." Ines admitted that she had recently moved to a different house, but did not believe that it was important to inform the social worker or DIF. Ines denied that two "uncles" were living in the house, claiming instead that she had given them overnight shelter. The court continued the hearing to allow DIF to evaluate Ines's new residence. It took Ines nearly three weeks to provide DIF with her new address.

Israel did not appear at the contested 18-month permanency review hearing, and his whereabouts at the time of the hearing were unknown. The court received in evidence Agency's various reports. Social worker Nidia Romero testified that it would be detrimental to the minors to be returned to Ines's custody, for the reasons stated in her written reports. Romero further testified, consistent with the recommendations in her reports, that it would be detrimental to the minors to be returned to Israel's custody. She noted that Israel had not visited the minors for the past month. Israel requested that no more weekend visits be scheduled because he worked on weekends and had no childcare. During Romero's last conversation with Israel, he said that he could not care for the minors because he had no stable home or employment.

After considering the evidence and arguments of counsel, the court found that returning the minors to either parent's custody would create a substantial risk of detriment to the minors' physical and emotional well-being. The court continued the minors' placements in foster care, terminated Ines's services, and ordered APPLA as the minors' permanent plans.

DISCUSSION

I

INES'S APPEAL

Ines contends that there was no evidence that returning the minors to her "able, loving" custody would be detrimental to the minors' safety, protection, or physical or emotional well-being. She asserts that: (1) she fully complied with every aspect of her service plan and completely alleviated the protective concerns that gave rise to the minors' dependencies; (2) there was no evidence that her home in Tijuana was unstable or that she could not "handle" all five children; (3) the court impermissibly equated poverty with bad parenting; (4) the minors' wishes as to their placements were not a legitimate obstacle to reunification; (5) the court impermissibly focused on the alleged risk that I.M. posed to J.M., A.M. and D.M.; and (6) Agency had made no attempt to locate services to help I.M. in Tijuana.

A

In addition to responding to Ines's appellate arguments on their merits, Agency has filed motions to augment the record on appeal with a detention report dated January 13, 2012, and juvenile court minute orders dated January 13, 2012 and February 7, 2012. We

grant those motions. (See *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1421-1422 [reviewing court may receive additional evidence in an appropriate case].) The detention report states that two months after the contested 18-month permanency review hearing, Agency learned that Ines had sent J.M., A.M. and D.M. to live with an "aunt," Elena A., in San Bernardino County. Ines told the social worker that she wants the children to live with Elena forever. Ines said that she is not able to provide for the children financially, and wants them to have the benefits they deserve as American citizens. J.M. and A.M. told the social worker that they want to live with Elena. They also said that Ines "drinks a lot of beer and that she always has male friends over." The detention report further indicates that Ines had not complied with her family maintenance services and had not allowed DIF to conduct home visits. Additionally, Agency learned that I.M.'s behavior and emotional state have deteriorated to the point that he now requires placement in a residential treatment facility.

The augmented record shows that Agency filed a petition under section 387 on behalf of I.M., requesting a higher level of care for him. Agency also filed petitions on behalf of J.M., A.M. and D.M., requesting that the court remove them from Ines's custody. According to the minute orders from the January 13, 2012 detention hearing, the court detained I.M. in a licensed group home and detained J.M., A.M. and D.M. in out-of-home care.

The minute orders of February 7, 2012 indicate that the court held a jurisdiction and disposition hearing at which it sustained the allegations of the section 387 petitions filed on behalf of I.M., J.M., A.M. and D.M.. The court removed J.M., A.M. and D.M.

from Ines's custody and placed them in out-of-home care, and placed I.M. in a group home.

B

Agency argues, and we agree, that this evidence renders harmless any error that Ines claims in her briefing on appeal. (See *In re B.D.* (2008) 159 Cal.App.4th 1218, 1240-1241 [postjudgment evidence properly considered to determine whether error was harmless].) Even if the court erred by failing to return the minors to Ines's custody on any of the grounds that she asserts, the error is harmless because Ines subsequently relinquished custody of the children in her care, and expressly stated that she does not want them living with her. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *In re Angel W.* (2001) 93 Cal.App.4th 1074, 1082 [*Watson* harmless error test applies in juvenile dependency matters].) Moreover, it would be impracticable to reverse the orders made at the 18-month permanency review hearing for the purpose of placing the minors with Ines, as she requests. Given the subsequent developments in this case, it is reasonable to conclude that it would be detrimental to the minors to be placed with Ines, who is no longer willing or able to have custody of the three younger children. (*In re Zeth S.* (2003) 31 Cal.4th 396, 412-413 [postjudgment evidence properly considered on appeal where state has strong interest in expediting dependency proceedings and promoting finality of court's orders and judgment].)

II

ISRAEL'S APPEAL

Israel contends that there was insufficient evidence to support the court's finding that it would be detrimental to the minors to return them to his custody. He asserts that the minors want to live with him, and that he is willing to provide the minors with the type of care, supervision and limits that they need. He further asserts that Agency's concerns about placing the minors with him were improperly based on his work schedule and need to support his family.

A

At the 18-month permanency review hearing, the juvenile court must "order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment." (§ 366.22, subd. (a).) Because the dependency scheme is based on the law's strong preference for maintaining family relationships whenever possible, the risk of detriment must be substantial, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 788.)

We review the record to determine whether there is substantial evidence to support the court's findings that the minors would be at substantial risk of detriment if returned to Israel's custody. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.) In so doing, we

do not consider the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing that there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Israel showed very little commitment to parenting the minors. As soon as the minors were removed from his custody, Israel fled to Mexico to avoid being arrested because he was undocumented. For 17 months, he made no effort to inquire about the minors' welfare, schedule visits, or ask about getting custody of them. Even after he returned to the United States and began having weekly supervised visits with all five children, Israel did not interact much with them or assume a parental role. Once Israel began having weekend visits with the minors, Agency became concerned about the lack of time, supervision and structure that the minors were receiving while in his care. Agency's concerns were not based on Israel's work schedule, but rather, on his failure to properly parent the minors and make them a priority in his life.

More than two years after the minors became dependents, Israel told the social worker that he was not ready to have custody of them. He missed a weekend visit with the minors and failed to notify them, causing the minors to be disappointed, sad and confused. A short time later, he told the social worker that he was now ready to have

custody of the minors, and that he had made arrangements for them to move in with him. The following week, Israel was involved in a domestic violence incident with a female roommate, and went into hiding because he was afraid that he would be arrested. After that, Israel's interest in obtaining custody of the minors or visiting them decreased. At the time of the 18-month permanency review hearing in September 2011, Israel had not seen the minors for two months.⁵ Based on this evidence, the court could reasonably find that Israel could not properly care for the minors, particularly I.M., who needs ongoing treatment for his sexualized behaviors, and now requires placement in a residential treatment facility.

Although 12-year-old E.M. and nine-year-old I.M. said that they wanted to live with Israel, other factors outweighed their preferences. Israel's issues involving alcohol abuse, domestic violence and physical abuse of the children have not been addressed. More importantly, Israel did not have a stable home. As the juvenile court noted at the 18-month permanency review hearing, Israel's whereabouts were unknown because he was "in hiding," it was unclear whether Agency would be able to find him, and there was "no indication that he has stable housing or the means available whatsoever to care for [the minors]." There was substantial evidence to support the court's finding that returning the minors to Israel's custody would create a substantial risk of detriment to the minors' safety, protection, or physical or emotional well-being. (§ 366.22, subd. (a).)

⁵ According to the augmented record on appeal, Israel visited I.M. only a few times between July 2011 and January 2012. Throughout that period, Israel failed to respond to Agency's efforts to contact him. This behavior does not indicate a willingness on Israel's part to be with and care for his sons.

DISPOSITION

The orders are affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.